



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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Suite 200  
Washington, DC 20007-3501

DEC 12 2016

RE: MUR 7039  
Senator Bernard Sanders  
Bernie 2016

Dear Mr. Deutsch:

On April 14, 2016, the Federal Election Commission notified your clients, Senator Sanders and Bernie 2016 and Susan Jackson in her official capacity as treasurer of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On December 6, 2016, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Senator Bernard Sanders violated the Act. The Commission also voted to dismiss the complaint as to Bernie 2016 and Susan Jackson in her official capacity as treasurer. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy, Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Christine C. Gallagher, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler", is written over a horizontal line.

Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

1704404407-1

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Bernie 2016 and Susan Jackson in her  
4 official capacity as treasurer  
5 Senator Bernard Sanders  
6

**MUR: 7039**

7 **I. INTRODUCTION**  
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9 This matter was generated by a Complaint filed with the Federal Election Commission by  
10 the American Democracy Legal Fund. *See* 52 U.S.C. § 30109(a)(1). This matter concerns an  
11 advertisement on Facebook paid for by Bernie 2016 and Susan Jackson in her official capacity as  
12 treasurer (the "Committee"), which did not contain a disclaimer stating who paid for or  
13 authorized it. While the advertisement itself did not contain a disclaimer, the ad contained  
14 information sufficient to identify the Committee, and it linked to both the Committee's website  
15 and a donation page on ActBlue's website, both of which contained compliant disclaimers. For  
16 the reasons set forth below, the Commission determines to exercise its prosecutorial discretion  
17 and dismiss the Complaint as to Bernie 2016 and Susan Jackson in her official capacity as  
18 treasurer. The Commission further finds that there is no reason to believe that Senator Bernard  
19 Sanders violated the Federal Election Campaign Act of 1971, as amended (the "Act").

20 **II. FACTUAL SUMMARY**

21 Sanders was a candidate for the 2016 Democratic Party presidential nomination. Bernie  
22 2016 is Sanders' principal campaign committee, and Susan Jackson is its treasurer.

23 ActBlue, a Massachusetts limited liability company, operates and maintains a website that  
24 provides Internet-based tools, including contribution forms, for Democratic candidates and

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1 donations to his campaign.<sup>3</sup> The hyperlink at the bottom left displays the Committee's web  
2 address: [www.berniesanders.com](http://www.berniesanders.com), and beneath the link is the statement: "Not affiliated with  
3 Facebook." By clicking on that link, the viewer is taken to the homepage of the Committee's  
4 website, which includes the following disclaimer: "Paid for by Bernie 2016."<sup>4</sup> The "Donate  
5 Now" button at the bottom right of the advertisement takes the viewer to the Committee's  
6 contribution page, which is hosted on ActBlue's website.

7 The contribution page displays the banner: "Bernie for President," and states "ActBlue—  
8 We just won the New Hampshire primary" and "[y]our contribution will benefit Bernie  
9 Sanders."<sup>5</sup> The contribution page also lists the Committee's address where checks were to be  
10 sent. Finally, the contribution page contains the following disclaimer: "Paid for by ActBlue  
11 (actblue.com) and not authorized by any candidate or candidate's committee."

12 The Complaint alleges that the Facebook advertisement did not include a disclaimer  
13 disclosing who paid for or authorized it.<sup>6</sup> The Complaint further alleges that the advertisement is

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<sup>3</sup> Compl. at 1-2, Ex. A (Mar. 29, 2016).

<sup>4</sup> See Bernie 2016 Resp. at 4, n. 10 (May 3, 2010); <https://web.archive.org/web/20160329082820/https://www.berniesanders.com/?nosplash=true>.

<sup>5</sup> Compl., Ex. B.

<sup>6</sup> Compl. at 2. The Complaint alleges that the Facebook advertisement was neither too small nor was it impracticable for it to contain the disclaimer. Compl. at 3.

In a previous Advisory Opinion Request, Facebook stated that its ads were character-limited, and sought confirmation that its ads qualified for either the "small items" or "impracticable" exemptions at 11 C.F.R. § 110.11(f)(1)(i) and (ii), and did not require a disclaimer. See AOR 2011-09 (Facebook) at 1, 6. The Commission considered three drafts, but did not issue an advisory opinion. See AO 2011-09. In this matter, the Committee and Sanders assert that its advertisement would have passed muster under either Draft B (which would have exempted the advertisement from disclaimer requirements under the "impracticable" exception) or Draft C (which would have considered the disclaimer requirement satisfied because the advertisement links to the campaign's website, which contains a full disclaimer). Bernie 2016 Resp. at n. 8. However, the ads in AOR 2011-09 appear to be materially different in appearances and features. Compare AOR 2011-09 at 6 with the screenshot on the previous page.

1 confusing because it lacks a disclaimer, and the contribution page displays a disclaimer for  
2 ActBlue, not the Committee.<sup>7</sup>

3 The Committee and Sanders assert that the advertisement complied with the applicable  
4 disclaimer requirements. First, they argue that the ad clearly shows that the Committee paid for  
5 and is responsible for it because the word “sponsored” appears next to the campaign logo, and  
6 the ad displays the Committee’s web address, berniesanders.com, as a link.<sup>8</sup> They also assert that  
7 the link takes the user to a landing page on the campaign’s website that contained a compliant  
8 disclaimer.<sup>9</sup>

9 ActBlue asserts that, through its website, it acts as an intermediary between individual  
10 contributors and Democratic candidates and their committees, and it does not solicit  
11 contributions for any candidate or committee, other than itself.<sup>10</sup> ActBlue further asserts that it  
12 had no part in placing the Facebook advertisement, nor did it pay anything to buy or place it.<sup>11</sup>  
13 ActBlue also explains that the Sanders contribution page is a webpage hosted on its site, and it  
14 does not charge any candidate or committee a fee to create such a page.<sup>12</sup> Finally, ActBlue

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<sup>7</sup> Compl. at 4.

<sup>8</sup> Bernie 2016 Resp. at 2.

<sup>9</sup> Bernie 2016 Resp. at 3-4, n. 10; <https://web.archive.org/web/20160329082820/https://berniesanders.com/?nosplash=true>. The Response provided the link to the Committee’s archived website as of March 29, 2016, because that is the date of the Complaint. See Bernie 2016 Resp. at n.10. A review of the internet archive shows additional captures of the Committee’s website as early as November 15, 2015, and the website appears to have always contained a compliant disclaimer. See <https://web.archive.org/web/20151115081614/https://berniesanders.com/?nosplash=true/>.

<sup>10</sup> ActBlue Resp. at 1 (Apr. 28, 2016).

<sup>11</sup> *Id.* at 1-2.

<sup>12</sup> *Id.* at 2.

1 asserts that, as a political committee, it was required to place a compliant disclaimer on the  
2 Sanders contribution page, and it did so.<sup>13</sup>

### 3 III. LEGAL ANALYSIS

4 The Act and the Commission's regulations require that whenever a political committee  
5 makes a disbursement for a public communication, such communication must include a  
6 disclaimer.<sup>14</sup> Internet communications placed on another person's website for a fee constitute  
7 "general public political advertising," and are thus "public communications," as defined in  
8 11 C.F.R. § 100.26.<sup>15</sup> If the communication was paid for and authorized by a candidate, an  
9 authorized committee of a candidate, or an agent thereof, the disclaimer must clearly state that  
10 the communication was paid for by the authorized committee.<sup>16</sup> All websites of political  
11 committees available to the general public must include a disclaimer.<sup>17</sup>

12 The Facebook advertisement did not contain a disclaimer, but it is not entirely clear  
13 whether one was required in the advertisement itself.<sup>18</sup> Regardless, the advertisement provides

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<sup>13</sup> *Id.* at 3.

<sup>14</sup> 52 U.S.C. § 30120(a)(1); 11 C.F.R. §§ 100.26, 110.11(a)-(b).

<sup>15</sup> Explanation and Justification for the Regulations on Internet Communications ("Internet Communications E&J"), 71 Fed. Reg. 18,589, 18,593 (Apr. 12, 2006).

<sup>16</sup> 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(b)(1).

<sup>17</sup> 11 C.F.R. § 110.11(a)(1); *see also* AO 1995-09 (NewtWatch) at 2.

<sup>18</sup> In AO 2010-19 (Google, Inc.), a majority of the Commission concluded that there was no violation for online text ads that displayed the address of the political committee's website, and the landing page on that site contained a fully compliant disclaimer. The Commission, however, could not agree on a rationale. Three Commissioners opined that the disclaimer requirements were satisfied because the text ad displayed the URL of the political committee's website and the landing page contained a compliant disclaimer, and that approach conformed to the Commission's practice of interpreting the Act and its regulations in a manner consistent with technological innovations. The three other Commissioners opined that the "impracticable" exception to the disclaimer requirement applied because ads generated by Google's AdWords program contained only text with a headline limited to 25 characters and two lines of text limited to 70 characters. *See* AO 2010-19 (Google, Inc.) at 2; Concurring Statement of Vice Chair Bauerly and Commissioners Walther and Weintraub at 3; Concurring Statement of Chair Petersen at 1;

1 some information to the public indicating that the Committee was responsible for it – Sanders’s  
2 name, his picture, his campaign logo, his committee’s web address, and the word “sponsored.”  
3 In addition the landing page on the Committee’s website contained a fully compliant disclaimer.

4 The allegation that the Committee’s ad was confusing because it also linked to a page  
5 with an ActBlue disclaimer is not persuasive. Clicking the “Donate Now” button takes the  
6 reader to a page clearly indicating that contributions would go to the Committee, but also clearly  
7 stating that the donation page was paid for by ActBlue. As a political committee, ActBlue is  
8 required to have a disclaimer on its publicly available website.<sup>19</sup> The disclaimer on the  
9 contribution page properly states that the website was paid for by ActBlue, it was not authorized  
10 by any candidate or candidate’s committee, and included its web address.<sup>20</sup>

11 Therefore, the Commission determines to exercise its prosecutorial discretion and dismiss  
12 the Complaint as to Bernie 2016 and Susan Jackson in her official capacity as treasurer.<sup>21</sup>  
13 Further, there is no reason to believe that Senator Bernard Sanders violated the Act.

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Statement for the Record by Commissioner Hunter at 1. Thus, while AO 2010-19 offers some support for a conclusion that Sanders’ Facebook ad might have been compliant, that ad is materially different from the Google ads because Sanders’ ad is significantly larger and contains features other than text.

The disclaimer requirements for internet communications are currently the subject of an Advanced Notice of Proposed Rulemaking (“ANPR”). See Agenda Doc. No. 16-50-A, Draft Federal Register Notice on Internet Communication Disclaimers (Sept. 28, 2016) (reopening the comment period and notice of hearing in the ANPR at 76 Fed. Reg. 63,567 (Oct. 13, 2011).

<sup>19</sup> 11 C.F.R. § 110.11(a)(1).

<sup>20</sup> 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3). Further, the Committee was not required to place its own disclaimer on the ActBlue contribution page. The Facebook advertisement contained a “Donate Now” button redirecting the user to the contribution page on the ActBlue website, which informs the user that he or she is making a contribution to the Sanders Committee. There are no facts indicating that the Committee or Sanders paid ActBlue a fee for creating the contribution page on its website.

<sup>21</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).